United States District Court

Eastern District of California

Larry Giraldes, Jr.,

Plaintiff, No. Civ. S 01-2110 LKK PAN P

vs. Findings and Recommendations

Prebula, et al.,

Defendants.

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Plaintiff is a prisoner, without counsel, seeking damages pursuant to 42 U.S.C. § 1983 upon the ground defendants were deliberately indifferent to his serious medical needs. He also seeks a preliminary injunction. Plaintiff alleges defendant Sauhkla, upon instruction from defendants Prebula and Gavia, prepared a memorandum authorizing plaintiff's transfer from California Medical Facility (CMF) to High Desert State Prison (HDSP) and Dr. Andreasen approved the transfer knowing HDSP could not provide adequate medical care for his severe digestive

problems, Hepatitis C and knee problems and that within days of the September 28, 2001, transfer plaintiff began to suffer vomiting and intestinal bleeding but was denied medical attention upon the ground the necessary care was unavailable at HDSP. Defendants move for summary judgment. Plaintiff opposes.

A party may move, without or without supporting affidavits, for a summary judgment and the judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. Fed. R. Civ. P. 56(a)-(c).

An issue is "genuine" if the evidence is such that a reasonable jury could return a verdict for the opposing party. Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986). A fact is "material" if it affects the right to recover under applicable substantive law. Id. The moving party must submit evidence that establishes the existence of an element essential to that party's case and on which that party will bear the burden of proof at trial. Celotex Corporation v. Catrett, 477 U.S. 317, 322 (1986). The moving party "always bears the initial responsibility of informing the district court of the basis for its motion and identifying those portions of 'the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any'" that the moving party believes demonstrate the absence of a genuine issue of material fact.

Id., at 323. If the movant does not bear the burden of proof on an issue, the movant need only point to the absence of evidence to support the opponent's burden. To avoid summary judgment on an issue upon which the opponent bears the burden of proof, the opponent must "go beyond the pleadings and by her own affidavits, or by the "'depositions, answers to interrogatories, and admissions on file,' designate 'specific facts showing that there is a genuine issue for trial.'" Id., at 324. The opponent's affirmative evidence must be sufficiently probative that a jury reasonably could decide the issue in favor of the opponent. Matsushita Electric Industrial Co., Inc. v. Zenith Radio Corporation, 475 U.S. 574, 588 (1986). When the conduct alleged is implausible, stronger evidence than otherwise required must be presented to defeat summary judgment. Id., at 587.

Fed. R. Civ. P. 56(e) provides that "supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein." Nevertheless, the Supreme Court has held that the opponent need not produce evidence in a form that would be admissible at trial in order to avoid summary judgment. Celotex, 477 U.S. at 324. Rather, the questions are (1) whether the evidence could be submitted in admissible form and (2) "if reduced to admissible evidence" would it be sufficient to carry the party's burden at trial. Id., at 327. Thus, in Fraser v. Goodale, 342 F.3d 1032 (9th Cir. 2003), objection to the opposing

party's reliance upon her diary upon the ground it was hearsay was overruled because the party could testify to all the relevant portions from personal knowledge or read it into evidence as recorded recollection.

A verified complaint based on personal knowledge setting forth specific facts admissible in evidence is treated as an affidavit. Schroeder v. McDonald, 55 F.3d 454 (9th Cir. 1995); McElyea v. Babbitt, 833 F.2d 196 (9th Cir. 1987). A verified motion based on personal knowledge in opposition to a summary judgment motion setting forth facts that would be admissible in evidence also functions as an affidavit. Johnson v. Meltzer, 134 F.,3d 1393 (9th Cir. 1998); Jones v. Blanas, 393 F.3d 918 (9th Cir. 2004).

Defects in opposing affidavits may be waived if no motion to strike or other objection is made. Scharf v. United States Attorney General, 597 F.2d 1240 (9th Cir. 1979) (incompetent medical evidence).

The following facts are undisputed: Plaintiff was a prisoner at the California Medical Facility (CMF) from July 28, 1994, until September 28, 2001, when plaintiff was transferred to High Desert State Prison (HDSP). At all times relevant, defendant Dr. Andreasen was the Chief Medical Officer and defendant Dr. Sauhkla was a physician at CMF. Defendants Prebula and Gavia were correctional counselors at CMF.

California Medical Facility is a prison staffed and equipped for prisoners with medical or psychiatric needs

requiring specialized and continuous care. Inmates with medical conditions requiring frequent outpatient diagnostic, treatment or rehabilitative services are designated, "Category O." Such a designation can override a classification otherwise warranting placement in a more secure institution.[1]

After portions of plaintiff's esophagus and stomach were removed in 1985, he began to suffer from gastroesophageal reflux disease (GERD), a condition in which acid flows into the canal leading to the stomach. Plaintiff cannot eat large portions of food and is subject to nausea, vomiting, bloating and diarrhea. Plaintiff loses weight easily.

Treatments for GERD include elevating the head about six inches while sleeping, medicines, eating several small meals daily instead of three large meals and regular liquid dietary supplements.

In 1994, plaintiff was designated "Category O" and was transferred to CMF, where he variously received a liquid diet of high-protein drinks, double portions of meals to be eaten as several small meals and the medicine Prevacid, which blocks the production of stomach acid.

In 1996, plaintiff began accumulating disciplinary convictions for trafficking narcotics, threatening staff, possessing a controlled substance, threatening a non-inmate,

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[1] Prison officials classify prisoners according to prisoners' needs, behavior and interests, departmental and institutional security interests and public safety in order determine the appropriate facility for the prisoner's confinement. 15 Cal. Admin. Code § 3375(a), (b).

assault on a non-inmate, possessing of marijuana and burning a mattress.

In 1997, plaintiff underwent surgery to reconstruct one knee but he re-injured it. Orthopedic specialists examined plaintiff but disagreed about the advisability of additional surgery.

June 6, 1998, a physician not named as a defendant recommended rescinding plaintiff's Category O designation because plaintiff had not had serious medical problems since 1994. February 7, 2001, defendant Sauhkla determined plaintiff's medical needs could be satisfied at any institution with a medical facility. February 23, 2001, defendant Andreasen found plaintiff's condition did not affect his place of confinement. May 24, 2001, defendant Sauhkla found plaintiff's medical needs could be satisfied at any institution with outpatient care, recommended rescinding plaintiff's Category O designation and recommended transferring plaintiff to any institution consistent with his custody needs.

Defendants Andreasen and Sauhkla periodically consulted orthopedic specialists, compared recent and remote knee x-rays, examined plaintiff, monitored plaintiff's GERD symptoms and adjusted plaintiff's treatment. Defendant Andreasen authorized plaintiff's use of a cane or a brace and plaintiff's weight occasionally dropped. Plaintiff developed gallstones and was diagnosed with Hepatitis C.

August 8, 2001, plaintiff appeared before a classification

committee (UCC) that included defendants Gavia and Prebula. Defendant Andreasen appeared and recommended plaintiff be transferred either to Salinas Valley State Prison (SVSP) or to HDSP. After considering plaintiff's disciplinary record and defendant Andreasen's recommendation, the committee determined plaintiff should be transferred either to SVSP or to HDSP.

September 28, 2001, plaintiff was transferred to HDSP.

October 3, 2001, a physician at HDSP examined plaintiff and questioned whether plaintiff should be confined there. But December 17, 2001, the physician determined HDSP could provide the medical care plaintiff required.

Plaintiff claims defendants were deliberately indifferent to his serious medical needs in several respects. Defendants contend there is no genuine issue of material fact concerning whether they were deliberately indifferent to plaintiff's serious medical needs.

Prison officials violate the Eighth Amendment when they are deliberately indifferent to prisoners' serious medical needs. Estelle v. Gamble, 429 U.S. 97, 106 (1976). A prison official is deliberately indifferent when he knows of and disregards a risk of injury or harm that "is not one that today's society chooses to tolerate." See Helling v. McKinney, 509 U.S. 25, 35 (1993); Farmer v. Brennan, 511 U.S. 825, 837 (1994). The official must "be aware of the facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw the inference." Farmer, 511 U.S. at 837. Deliberate

indifference "may appear when prison officials deny, delay or intentionally interfere with medical treatment, or it may be shown by the way in which prison physicians provide medical care." Hutchinson v. United States, 838 F.2d 390, 394 (9th Cir. 1988). Mere negligence does not suffice. Gamble, 429 U.S. at 106.

Plaintiff asserts defendants Prebula and Gavia instructed defendant Sauhkla to authorize plaintiff's transfer from CMF to HDSP knowing plaintiff would not receive adequate medical care at HDSP. There is no evidence that implicates Prebula and Gavia in any wrongdoing and so they are entitled to judgment as a matter of law.

Plaintiff asserts defendants Sauhkla and Andreasen knew plaintiff would not receive adequate care for GERD at HDSP. It is undisputed a physician at HDSP initially questioned whether plaintiff's medical needs could be satisfied there but later determined they could be satisfied. There is no evidence defendants knew of facts from which they could infer plaintiff's needs could not be satisfied there, drew the inference and recommended the transfer anyway. No reasonable jury could find in plaintiff's favor and so Sauhkla and Andreasen are entitled to judgment as a matter of law.

Plaintiff asserts defendants Sauhkla and Andreasen knew plaintiff would not receive adequate care for Hepatitis-C at HDSP but the record contains no evidence supporting this assertion. No reasonable jury could find in plaintiff's favor and so Sauhkla

and Adreasen are entitled to judgment as a matter of law on this claim.

Plaintiff asserts defendants Sauhkla and Andreasen recommended his transfer knowing he was scheduled for gallbladder surgery and for knee surgery.

It is undisputed these defendants monitored plaintiff's condition at CMF, in 1998 a CMF physician recommended rescinding plaintiff's Category O designation, orthopedic specialists disagreed about whether knee surgery was advisable and defendants knew plaintiff developed gallstones and was diagnosed with Hepatitis C while at CMF. Defendants adduce evidence plaintiff was not scheduled for gallbladder surgery or knee surgery before the transfer and plaintiff underwent gallbladder surgery after the transfer.[2] Plaintiff adduces no evidence to contest this or to show defendants were aware of a high risk of danger to plaintiff but delayed surgery anyway. No reasonable jury could find in plaintiff's favor and so Sauhkla and Andreasen are entitled to judgment as a matter of law.

For these reasons, plaintiff's March 2, 2005, motion for a preliminary injunction should be denied, defendants' April 28, 2005, motion for summary judgment should be granted and judgment should be entered in their favor.

Pursuant to the provisions of 28 U.S.C. § 636(b)(l), these findings and recommendations are submitted to the United States

[2] As of the date of the parties' submissions, plaintiff had not undergone knee surgery.

District Judge assigned to this case. Written objections may be filed within 20 days of service of these findings and recommendations. The document should be captioned "Objections to Magistrate Judge's Findings and Recommendations." The district judge may accept, reject, or modify these findings and recommendations in whole or in part.

Dated: January 24, 2006.

/s/ Peter A. Nowinski
PETER A. NOWINSKI
Magistrate Judge